Supreme Court, U.S.
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No. 98-1951

In the Supreme Court of the United States

EMMANUEL J. FOROGLOU, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
LINDA S. WENDTLAND
JOHN M. MCADAMS, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether substantial evidence supports the Board of Immigration Appeals' denial of asylum and withholding of deportation to petitioner, who opposes on philosophical grounds his government's universal, compulsory military service requirement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 170 F.3d 68. The decision and order of the Board of Immigration Appeals (Pet. App. 9-13) and the decision and order of the immigration judge are unreported.[1]

JURISDICTION

The court of appeals entered its judgment on March 5, 1999. The petition for a writ of certiorari was filed on June 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] We have lodged a copy of the decision and order of the immigration judge, which is not included in the appendix to the certiorari petition, with the clerk of this Court.

STATEMENT

1. The Immigration and Nationality Act of 1952 (INA), 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (1994 & Supp. III 1997). If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C. 1158(a) (1994). An alien claiming eligibility for asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite well-founded fear of persecution. 8 C.F.R. 208.13(a). Once an alien has established his eligibility for asylum, the decision to grant or deny asylum falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a).[2]

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[2] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI, Subtit. A, 110 Stat. 3009-690, significantly revised the INA's asylum provision. That amendment, however, does not govern the present case because it applies to applications for asylum filed on or after April 1, 1997. IIRIRA § 604(c), 110 Stat. 3009-694. The changes in asylum worked by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV, Subtit. C, § 421(a), 110 Stat. 1270, do apply to this case, because the AEDPA amendment governs asylum determinations made on or after the amendment's effective date of April 24, 1996. AEDPA § 421(b), 110 Stat. 1270. The AEDPA amendment, however, is not pertinent to petitioner's claim.

In addition, "if the Attorney General determines" that an alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1) (1994). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (applicant bears the burden of proof of eligibility for withholding). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[3]

2. a. Petitioner is a native and citizen of Greece. Pet. App. 2. Petitioner arrived in the United States in 1983 on a non-immigrant student visa, which was later changed to a non-immigrant professional visa when petitioner obtained a teaching job. Petitioner's eligibility for that visa expired when he left the teaching job, but he failed to inform the Immigration and Naturalization Service (INS) of his changed status. *Ibid.*

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[3] IIRIRA substantially revised the INA's withholding-of-deportation provisions, see IIRIRA, Tit. III, Subtit. A, § 305, 110 Stat. 3009-602, which are now codified at 8 U.S.C. 1231(b)(3) (Supp. III 1997). IIRIRA does not govern the present case because its provisions apply only to withholding applications filed by aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III, Subtit. A, § 309(a), 110 Stat. 3009-625. AEDPA's changes in the withholding provision (see Pub. L. No. 104-132, Tit. IV, Subtit. B, § 413(f), 110 Stat. 1269-1270) do apply, because the Board's final decision was not issued until after AEDPA's date of enactment. See *id.* § 413(g), 110 Stat. 1269; see also *INS* v. *Aguirre-Aguirre*, 119 S. Ct. 1439, 1443 (1999). The AEDPA amendments, however, are not pertinent to petitioner's claim.

In October 1993, the INS commenced deportation proceedings against petitioner. Pet. App. 2; see also 8 U.S.C. 1251(a)(1)(C)(i). Petitioner conceded deportability, but sought asylum and withholding of deportation based on his opposition to Greece's compulsory military service requirement for all males between the ages of 18 and 50. Pet. App. 2. Petitioner claimed that, following his arrival in the United States, he developed a belief in "Objectivism," a philosophy espoused by the twentieth-century author Ayn Rand. One tenet of Objectivism is an opposition to forced military service, on the ground that the government lacks the authority to compel a citizen to place his life at risk. *Ibid.* Objectivism is not a pacifist ideology that opposes the use of violence; petitioner admits that "he would not object to serving *voluntarily* in the Greek military." Pet. 11.

The Greek government permits draftees who oppose military service to serve in non-combatant roles, albeit for twice the time commitment of routine draftees.[4] In addition, the Greek government offers an alternative civilian service for conscientious objectors that lasts from 12 to 18 months longer than combatant military service. Pet. App. 2-3. The conscientious objector exception, however, appears to be limited to those (unlike petitioner) who oppose the use of weapons. *Id.* at 3.

b. Following a hearing, the immigration judge found that petitioner had failed to demonstrate a well-founded fear of persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. The immigration judge concluded that any imprisonment petitioner might face upon his return to Greece would result from his refusal to comply with

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[4] Ordinarily, military service lasts for 24 months. Pet. App. 2.

Greece's universal military service requirement, and not because of his particular beliefs or views about that requirement. Pet. App. 3. The immigration judge accordingly denied petitioner's requests for asylum and withholding of deportation, but granted him voluntary departure to Greece. *Id.* at 3-4.

The Board of Immigration Appeals affirmed. Pet. App. 9-13. The Board explained that a government does not engage in persecution merely by requiring its citizens to perform military service. *Id.* at 10-11. Consequently, the Board continued, draft evasion does not give rise to a well-founded fear of persecution unless the failure to serve in the military would result in disproportionately severe punishment on account of a protected characteristic or the individual would be required to engage in inhuman conduct. *Id.* at 11 (citing *Matter of R-R-*, 20 I. & N. Dec. 547 (1992); *Matter of A-G-*, 19 I. & N. Dec. 502 (1987)). The Board concluded that petitioner failed to "establish[] that * * * any potential punishment could constitute persecution" or that "he will be disproportionately punished on account of one of the statutorily protected grounds for refusing to serve in the military." *Id.* at 10, 12.

3. The court of appeals affirmed. Pet. App. 1-8. The court agreed with the Board that "[i]t is not persecution for a government to require military service of its citizens." *Id.* at 5. The court explained:

> Nothing in the language of the federal definition of refugee (requiring persecution on one of the five enumerated grounds) suggests that it applies when a foreign country simply insists on universal military service for all citizens and provides no exemptions. In such a case, the resistor might refuse

> service out of religious or political conviction; but punishment for refusing to serve would not be "persecution" (even assuming [] that term is apt) "on account of" the objector's religious or political opinion, * * * but instead would be "because of his refusal to fight for the government."

Id. at 6 (citing *INS* v. *Elias-Zacarias*, 502 U.S. 478, 483 (1992)). The court of appeals found no evidence in the record that the Greek government had threatened petitioner with military service because he is an Objectivist. Nor was there evidence that the Greek government targeted Objectivists who refuse to serve for disproportionate punishment. Pet. App. 5. Further, the court rejected petitioner's claim that his imprisonment would represent disproportionate treatment because Greece allows only religious objectors and not secular Objectivists to qualify for the alternative civilian service. The court first observed that it was not clear why the alleged distinction mattered to petitioner, because he objected to *any* compelled government service, whether military or civilian. *Id.* at 7. Second, the court of appeals explained that the INA does not categorize as persecution every failure of a foreign government to construct its own draft laws to conform to the "highly complex equal protection jurisprudence" of the United States. *Id.* at 7-8. Noting that it was "doubtful" that the distinctions petitioner attributes to the Greek draft exemptions would be unconstitutional in this country, *id.* at 8 (citing *Gillette* v. *United States*, 401 U.S. 437, 446-448 (1971)), the court of appeals declined to categorize as "'persecution' a set of foreign-country exemption rules not all that different than our own." *Ibid.*

Finally, the court rejected petitioner's contention that the immigration judge demonstrated "bias" against him, concluding that the immigration judge had evinced only "annoyance" and "disagreement" with petitioner's arguments. Pet. App. 8.

ARGUMENT

1. Petitioner contends (Pet. 6-12) that the court of appeals erred in holding that substantial evidence supports the Board's rejection of his claim of persecution. That claim does not merit this Court's review. First, the task of determining whether an agency's decision is supported by substantial evidence belongs "primarily" to the court of appeals. "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974); see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That principle should apply with particular force when, as here, both levels of the administrative agency and the court of appeals concurred in their analysis of the record and their application of the governing law to the record.

Second, the record-bound and case-specific determination of whether petitioner's evidence demonstrated a clear probability of persecution presents no question of broad or recurring importance meriting this Court's review.

Third, the immigration judge, the Board, and the court of appeals all correctly determined that petitioner's evidence of persecution falls short of the mark. This Court held in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), that the consequences an individual faces as a result of resistance to military recruitment do not, by

themselves, establish a well-founded fear of persecution. *Id.* at 482-483. That is because such evidence leaves unanswered the question whether the individual is being persecuted because of a protected characteristic "rather than because of his refusal to fight." *Id.* at 483. Even supporters of a military organization, the Court explained, "might resist recruitment for a variety of reasons—fear of combat, a desire to remain with one's family and friends, a desire to earn a better living in civilian life, to mention only a few." *Id.* at 482.

Furthermore, an individual is a refugee only if he establishes a well-founded fear that he will be persecuted "on account of" his race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. 1101(a)(42)(A); see *Elias-Zacarias*, 502 U.S. at 482. Here, petitioner offered no evidence to support his claim that the Greek government would treat him differently than any other draft resistor because of his Objectivist beliefs:

> In this case, Greek law subjects all men to military service. There is no evidence that the Greek government has threatened [petitioner] with military service because he is an Objectivist, nor is there any evidence that the Greek government targets Objectivists who refuse to serve for disproportionate punishment.

Pet. App. 5. While petitioner claims that he would be ineligible for the two alternatives to routine military conscription, that does not change the fact that the motivation for the Greek government to punish petitioner would remain his failure to comply with the draft law, rather than his philosophical or political views. Moreover, the fact that the Greek government has adopted humanitarian alternatives to combat

service does not transform the consistently applied term of imprisonment for those who refuse service of any kind (see Immigration Judge Dec. at 10) into the type of persecution condemned by the INA.

2. Petitioner claims (Pet. 13) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *Canas-Segovia* v. *INS*, 970 F.2d 599 (1992), because in the latter case, the court of appeals held that punishment for draft resistance could qualify as persecution, within the meaning of the INA, if the government falsely imputes a political opinion to the individual as a result of his refusal to join the military. *Id.* at 602. But that case is of no assistance to petitioner. Petitioner offered no evidence that the Greek government would falsely impute a political opinion to him as a result of his draft resistance. To the contrary, he repeatedly relies on his actual opinion regarding involuntary governmental conscription.

Petitioner also seeks review (Pet. 13-15) on the ground that the court of appeals failed to follow the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (rev. ed. Jan. 1992) (Handbook), which leaves it "open to Contracting States[] to grant refugee status to persons who object to performing military service for genuine reasons of conscience." *Id.* para. 173, at 41. As the court of appeals explained, however, that discretionary language leaves it "to Congress to adopt that course, but it has not done so here." Pet. App. 7. In any event, the Handbook "is not binding on the Attorney General, the BIA, or United States courts." *INS* v. *Aguirre-*

Aguirre, 119 S. Ct. 1439, 1447 (1999); see also *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).[5]

3. Finally, petitioner claims (Pet. 15-18) that certain comments made by the immigration judge during his hearing violated the First Amendment's guarantee of freedom of conscience. The court of appeals properly rejected that claim, explaining that, while the immigration judge showed "considerable annoyance with [petitioner's] claims, * * * disagreement with [petitioner's] arguments is not proof of bias." Pet. App. 8. In any event, the necessarily record-bound determination of alleged individualized bias presents no question of broad or recurring importance that merits an exercise of this Court's certiorari jurisdiction.

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[5] Petitioner's additional contention (Pet. 14) that the court of appeals "mistakenly compared" Greece's draft law to that of the United States is also unavailing. The court of appeals simply made the unremarkable observation that it is highly unlikely that Congress would have intended sanctions permitted by United States law to constitute the type of persecution proscribed by the INA. See Pet. App. 8. Petitioner is simply wrong, moreover, in suggesting that the court's reference to United States law conflicts with the Ninth Circuit's mode of analysis. See *Canas-Segovia* v. *INS*, 902 F.2d 717, 723 n.11 (1990) ("United States jurisprudence is relevant to analysis of new issues of United States refugee law."), judgment vacated on other grounds, 502 U.S. 1086 (1992).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
DONALD E. KEENER
LINDA S. WENDTLAND
JOHN M. MCADAMS, JR.
Attorneys

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